STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Cavanagh, P.J., Jansen and Gage, J.J.

FLUOR ENTERPRISES, INC.,

Plaintiff-Appellee/Cross-Appellant,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant-Appellant/Cross-Appellee.
_____/

Supreme Court No. 129149

Court of Appeals No. 251005

Lower Court Case No. 02-27-MT

BRIEF OF CROSS-APPELLEE

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

I. **Subsection 53(c) of the Single Business Tax Act provides that receipts are deemed to be Michigan receipts if derived from services for ". . . planning, design or construction activities within this state. . . ." In this case, the Cross-Appellant, while engaging in construction activities within Michigan, consumed architectural and engineering services performed outside Michigan. Did the Court of Appeals correctly determine that these architectural and engineering services were to be treated as Michigan receipts and included in Cross-Appellant's Michigan sales for single business tax apportionment purposes?**

II. **The United States Supreme Court has held that to be lawful under the Commerce Clause, US Const, art I, §8, cl 3, a state tax statute affecting multi-state taxpayers must: (1) be applied to an activity having a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. Subsection 53(c) of the Single Business Tax Act, which is presumed to be constitutional, provides: "Receipts derived from services performed for the planning, design, or construction activities within this state shall be deemed Michigan receipts." The question is whether § 53(c), when properly analyzed, is in violation of the Commerce Clause.**

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

For its Counter-Statement of Proceedings and Facts, Cross-Appellee Revenue Division, Department of Treasury, State of Michigan, ("Department") adopts and incorporates by reference its Statement of Proceedings and Facts, as set forth at pp. 1-9 in its Brief as Defendant-Appellant.

ARGUMENT

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I. Subsection 53(c) of the Single Business Tax Act, MCL 208.53(c), provides that services performed for a Michigan construction project are treated as Michigan sales. It is undisputed that the services at issue here were performed for construction projects in Michigan. Therefore, the services at issue are Michigan sales.

A. Standard of Review

This action does not involve any controverted facts. The questions presented are questions of law subject to *de novo* review.[1]

B. Applicable rules of statutory construction support the Court of Appeals, as well as the Department's, construction of the statute.

The question presented in this matter is the appropriate meaning of § 53(c), MCL 208.53(c). Appellee/Cross-Appellant ("Fluor") asserts that a proper construction of § 53(c) is achieved when the phrase "within this state" is applied to not only "activities," but also to "planning", "design" and "construction." The Department's position, that was accepted by the Court of Appeals, is that the phrase "within this state" modifies the word "activities."

The Court of Appeals correctly interpreted § 53(c) by using the appropriate rules of statutory construction when examining statutes. In its decision below the Court of Appeals described the analytical process involved, saying[2]:

> The primary objective of judicial interpretation of statutes is to determine and give effect to the intent of the Legislature. Courts must initially examine the text of the statute. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Courts must first examine the text of the statute. *Id.*
>
> > "The words of a statute provide 'the most reliable evidence of [the Legislature's] intent. . . .'" *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). In discerning

[1] *Cardinal Mooney High School v Michigan High School Athletic Assoc*, 437 Mich 75, 80; 467 NW2d 21 (1991).
[2] Court of Appeals Opinion, pp 5-6, Cross-Appellant's Appendix p 35a.

> legislative intent, a court must "give effect to every work, phrase, and clause in a statute. . . ." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley; supra* at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501, 133 L Ed 2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley, supra* at 237. "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id* at 236. [*Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).]

According to *Mayor of Lansing v Public Service Comm*, 470 Mich 154, 165-166; 680 NW2d 840 (2004), the test for determining when a statute is ambiguous is *not* whether reasonable minds can differ concerning the meaning of the statue:

> The dissent would hasten findings of "ambiguity" by courts by predicating these findings on the basis of whether "reasonable minds can differ regarding" the meaning of a statue. *Post* at 851. Especially in the context of the types of cases and controversies considered by this Court—those in which the parties have been the most determined and persistent, the most persuaded by the merits of their own respective arguments—it is extraordinarily difficult to conclude that reasonable minds cannot differ on the correct outcome. That is not, and has never been, the standard either for resolving cases or for ascertaining the existence of an ambiguity in the law. The law is not ambiguous whenever a dissenting (and presumably reasonable) justice would interpret such a law in a manner contrary to a majority. Where a majority finds the law to mean one thing and a dissenter finds it to mean another, neither may have concluded that the law is "ambiguous," and their disagreement by itself does not transform that which is unambiguous into that which is ambiguous. Rather, a provision of the law is ambiguous only if it "irreconcilably conflict[s]" with another provision, [*Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), or when it is *equally* susceptible to more than a single meaning. [Emphasis in original.]

Under this "traditional approach . . . only a few provisions are truly ambiguous . . . ." *Id.* at 166.

The Court of Appeals held that the statute at issue was not ambiguous, did not irreconcilably conflict with another provision, and was not equally susceptible to more than a

single meaning. The Court properly used the "last antecedent" rule and determined that the phrase "within this state" modified the word "activities" and *not* "planning activities", "design activities" or "construction activities" (as argued by Fluor). In the alternative, Fluor argues that the statute could only be reasonably read to refer to "services performed . . . within this state."

The "last antecedent" rule is an accepted rule of statutory construction that provides ". . . a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation."[3] Using this rule, the Court of Appeals determined that the phrase "within this state" contained in § 53(c) was intended to modify only the word "activities." This is a correct application of the rule. It is the economic impact of the "activities", be they planning, design or construction, that give rise to the "value added," which is the base of the single business tax. The Court of Appeals correctly recognized the Department's long-standing position was entitled to considerable weight and accordingly held that services consumed in the performance of construction activity in the State of Michigan are properly characterized as being Michigan sales pursuant to § 53(c).[4]

As noted by the Court of Appeals, the first task when analyzing a statute is to examine the statute's language. When § 53(c) is examined in its entirety its meaning is readily apparent. Section 53 provides:

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
> (c) Receipts derived from services performed for planning, design, or

[3] *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002); see also 2A Singer, Sutherland Statutory Construction (6th ed), § 47:26, 47:33, pp 333-334, 369-371.
[4] *Magreta v Ambassador Steel Co*, 380 Mich 513, 519; 158 NW2d (1968).

construction activities within this state shall be deemed Michigan receipts.

The foregoing plainly defines when sales, of other than tangible personal property, (i.e. services) are to be deemed Michigan sales for single business tax purposes. Subsection 53(a) provides that when the business activity is in Michigan, the sales of other than tangible personal property are Michigan sales. Subsection 53(b) covers the scenario where business activities are both in Michigan and outside of Michigan. If a greater proportion of the business activity is in Michigan, then the sales of other than tangible personal property are characterized as Michigan sales. (The converse would be that if the greater proportion of the business activity is outside Michigan, then the sales of other than tangible personal property would not be characterized as Michigan sales.) Subsection 53(c) addresses the situation where services are performed for planning, design, or construction projects in Michigan. Subsections (b) and (c) are conditional; activities that are performed outside Michigan are deemed Michigan sales under certain situations.

Subsection 53(c) is perhaps better understood when it is divided into its three components. That is:

-Receipts derived from services

-performed for planning, design, or construction activities within this state

-are deemed Michigan receipts.

Subsection 53(c) unambiguously states that services performed "for" construction *that occurs* in Michigan are deemed to be Michigan receipts. It neither states nor requires that the receipts be derived from services performed in Michigan. Furthermore, it would be superfluous if it did. Subsection 53(a) expressly addresses services performed in Michigan. ("The business activity is performed in this state.") If § 53(c) were to be interpreted to mean that the services had to be performed in Michigan in order to be considered Michigan receipts, then the statutory

construction maxim that: "[E]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible," would have no import. [5] The construction urged by Fluor would reduce subsection (c) to a redundancy. While the Court of Claims erred in adopting Fluor's contention that subsection (c) only governs services performed in Michigan, the Court of Appeals correctly interpreted § 53(c).

Further, the use of the term "deemed" in § 53(c) is significant. Black's Law Dictionary defines "deem" to mean "treat as if."[6] When "deemed" is replaced with "treated as if", § 53(c) would read: "Receipts derived from services performed for planning, design, or construction activities within this state shall be **treated as if** Michigan receipts." Subsection 53(c) addresses those services that would not otherwise be treated as Michigan sales.

The Court of Appeals construction is consistent with the statute's plain meaning; moreover, it is confirmed by the statute's legislative history.

C. **Legislative History of § 53**

Subsections (a) and (b) of MCL 208.53 are derived from the Multistate Tax Compact, Uniform Division of Income for Tax Purposes Act (UDITPA)[7].

Subsection 53(c), however, was added by the Legislature because of a concern by Michigan-based engineering and architectural firms that they would be at a competitive disadvantage with out-of-state firms. They feared that out-of-state architects and engineers would gain a competitive advantage when bidding on Michigan construction projects if services that those out-of-state firms provided for those in-state projects were not treated as Michigan sales. In other words, there would be an economic incentive for those engaged in construction

[5] *Altman v Charter Township of Meridian,* 439 Mich 623, 635; 487 NW2d 155 (1992).
[6] Black's Law Dictionary, p 414 (6th ed).
[7] MCL 205.581, art IV, subdiv (17).

projects in Michigan to have the services performed by out-of-state resources. A July 17, 1975, letter from the Consulting Engineers of Michigan, Inc., to Senator John Bowman proposed the addition of subsection 53(c).[8] The letter and circumstances surrounding the adoption of this subsection demonstrate that it was enacted so that all of the services performed for construction projects are attributed to the State where those services are consumed (i.e., the State *where the construction takes place*). Receipts from services that are performed for Michigan construction projects are simply Michigan sales. Conversely, receipts from services performed for out-state construction projects are not Michigan sales. When read as a whole, § 53(c) provides that receipts derived from services performed out-of-state for planning, design, or construction performed in this State (i.e., Michigan business activity) are treated as if Michigan receipts.[9]

The Court of Appeals interpretation mirrors § 52, which governs sales of tangible personal property.[10] Under § 52(a), property shipped to a Michigan purchaser is a Michigan sale "regardless of the free on board or other conditions of the sale."[11] Under subsection 52(a) property consumed in Michigan is a Michigan sale even if title passes outside of this State whether or not that sale may occur outside of Michigan under the Uniform Commercial Code.

In summary, when § 53 is read as a whole it is clear that subsection 53(c) treats receipts received for services performed for Michigan projects as Michigan receipts.

> Nor will it be forgotten, in any question of statutory tax interpretation, that taxing is a practical matter and that the taxing statutes must receive a practical

[8] Cross-Appellee's Appendix, p 1b-2b

[9] It must be noted that this interpretation reduces the single business tax liability for those Michigan firms who perform services for out-state construction projects. In the case of out-state construction projects, none of the services performed by a Michigan firm would be included in its Michigan sales. Under Fluor's interpretation, these services would be included in the Michigan firm's sales, thereby increasing that firm's single business tax liability.

[10] [10] MCL 208.52.

[11] MCL 208.52(a).

construction. While they will not be extended by implication, . . . neither will the words thereof be so narrowly interpreted as to defeat the purposes of the act.[12]

II. The Legislature permissibly included all receipts derived from services performed for Michigan construction projects, and therefore consumed in Michigan, as Michigan sales. If each State uses the same rule for attribution of services performed for construction projects, there is no double attribution or taxation. The statute conforms with constitutional Commerce Clause standards for nexus, apportionment, and non-discrimination.

A. Standard of Review

This action does not involve any controverted facts. The questions presented are questions of law subject to *de novo* review.[13]

B. Tax Statutes Enjoy A Strong Presumption That They Are Constitutional.

This Court, in *Caterpillar v Dep't of Treasury,*[14] described how constitutional challenges to a statute should be analyzed and explained the strong presumption that the Legislature acted within constitutional constraints when enacting a tax provision[15]:

> When considering the constitutional challenge presented by Caterpillar and reviewing the decisions of the lower courts in this case, we begin our analysis by recognizing that, in regard to such issues, we are guided by several well-established principles of law that frame our inquiry. *Johnson v Harnischfeger Corp,* 414 Mich 102, 112; 323 NW2d 912 (1982). Legislation that is challenged on constitutional grounds is "clothed in a presumption of constitutionality." *Cruz v Chevrolet Grey Iron Div of General Motors Corp,* 398 Mich 117, 127; 247 NW2d 764 (1976). A statute is presumed constitutional absent a clear showing to the contrary. *Lehnhausen v Lake Shore Auto Parts Co* ,410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973). . . The presumption of constitutionality is especially strong with respect to taxing statutes. *Ludka v Dep't of Treasur*y, 155 Mich App 250, 264; 399 NW2d 490 (1986), citing *O'Reilly v Wayne C*o, 116 Mich App 582, 591-592; 323 NW2d 493 (1982). State legislatures have great discretionary latitude in formulating taxes. *Wisconsin v J C Penney C*o, 311 US 435, 444-445; 61 S Ct 246; 85 L Ed 267 (1940). . . . A taxpayer challenging a tax on constitutional grounds must overcome a strong presumption in favor of the

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[12] *Michigan Bell Telephone Co v Dep't of Treasury,* 445 Mich 470, 478; 518 NW2d 808 (1994), quoting *In re Brackett Estate,* 342 Mich 195, 205; 69 NW2d 164 (1955).
[13] *Cardinal Mooney High School,* 437 Mich at 80.
[14] *Caterpillar v Dep't of Treasury,* 440 Mich 400; 488 NW2d 182 (1992), *cert den* 506 US 1014 (1992).
[15] *Caterpillar,* 449 Mich at 413-415.

> taxing statute's validity and point out with specificity the constitutional provision that is violated. *Penn Mut Life Ins Co v Dep't of Licensing & Regulation,* 162 Mich App 123; 412 NW2d 668 (1987); *Huron-Clinton Metropolitan Auth'y v Bd of Supervisors of Five Counties,* 300 Mich 1, 12; 1 NW2d 430 (1942); *Young v Ann Arbor,* 267 Mich 241, 243; 255 NW 579 (1934). A taxing statute must be shown to "'clearly and palpably violate[ ] the fundamental law'" before it will be declared unconstitutional. *O'Reilly, supra,* at 592, citing *Thoman v Lansing*, 315 Mich 566, 577; 24 NW2d 213 (1946).

Here, Fluor erroneously argues that the Court of Appeals interpretation of § 53(c) violates the Commerce Clause under the *Complete Auto* test.[16] Under that test a State tax does not violate the Commerce Clause if it: (1) is applied to an activity having a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State.

Fluor contends that the Department's position, as affirmed by the Court of Appeals, violates the first three prongs of the *Complete Auto* test. According to Fluor, there must exist a substantial nexus, not just between the taxpayer to be taxed and the State, but between the activity to be taxed and the State.[17] The activity that gives rise to the "value added" taxed in the instant case is the improvement to real property in Michigan. The question presented in this case is not *what* activity is being subjected to the single business tax, but rather *how much* of a multi-state taxpayer's business activity is properly apportioned to Michigan. Subsection 53(c) does not define what "activity" is subjected to single business tax; it directs how the single business tax sales factor is computed. The purpose of computing the sales factor is to determine how a multi-state taxpayer should apportion their sales to Michigan.

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[16] See *Complete Auto Transit, Inc v Brady,* 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977).

[17] See Fluor's brief, beginning at p 13.

States have great latitude when enacting tax provisions.[18] For example, Iowa relies solely (and permissibly) on sales for apportioning a multi-state taxpayer's tax base.[19] Other States use different factors and differing weights to those factors. In Michigan, the Legislature has amended the single business tax apportionment factor numerous times. Importantly, Michigan is not levying a single business tax on Fluor's California activities, as the company argues. Rather, § 53(c) is a valid recognition by the Legislature that when Fluor engages in a construction project *in Michigan* and it performs services in California that are *actually consumed in Michigan*, it is fair for Michigan to consider the totality of Fluor's activities related to the Michigan project when apportioning its tax base. It must also be noted that Fluor's tax base is unaffected by either (the Department's or Fluor's) construction of § 53—only the *apportionment* of that tax base.

Fluor's services performed for Michigan construction projects unquestionably add value to Michigan's economy. It is also consistent with the concept of a value-added tax.[20] This is different than a tax on those receipts. The economic input (i.e., value added) at issue in this case is engineering and architectural services that are consumed in a Michigan construction project. The value of the services is incorporated in the completed Michigan project. Michigan is not taxing Fluor's California services but merely recognizing the value added to Michigan's economy by Fluor's Michigan projects (which included the Midland Cogeneration plant, a refinery modification for Marathon Oil in Detroit, and a steam building expansion for what was Upjohn in Kalamazoo). Under the Single Business Tax Act, it is the "value added" to Michigan's economy by these projects that is taxed under the Single Business Tax Act.

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[18] "We have always declined to undertake the essentially legislative task of establishing a single constitutionally mandated method of taxation." *Trinova Corp v Michigan Treasury Dep't*, 498 US 358, 386; 111 S Ct 818; 112 L Ed 2d 884 (1991), internal quotes omitted.

[19] See *Moorman Manufacturing Co v Bair*, 437 US 267; 98 S Ct 2340; 57 L Ed 2d 197 (1978).

Here, contrary to Fluor's assertion, the first prong of the *Complete Auto* test is met because the tax is being applied to Michigan projects (e.g., the construction of the Midland Cogeneration plant and construction at a Marathon Oil refinery in Detroit). Additionally, as correctly noted by the Court of Appeals[21],

> . . .the connection between a taxing state and the activity does not depend on geographical accounting of the particular business activity. Although the decision in *Allied-Signal, supra,* concerned apportionment of income, rather than value added tax, the Court's decision in *Trinova, supra,* suggest that the same standard would apply with respect to apportionment under the SBTA. The United States Supreme Court upheld the use of the SBTA apportionment formula because it concluded that value added, like income, is not susceptible of precise geographic assignment. [Citations omitted.]

Likewise, the second prong of the *Complete Auto* test is met; as the single business tax is fairly apportioned because (as noted in the Department's appellate brief) if all States employed a tax identical to the SBT there would be no overlapping of taxes. Services that are consumed in Michigan are included in Michigan's sales factor while those consumed in another State for construction projects in that State would be included in that State's sales factor. The value of services would thus be included in the sales factors of the states where the services were consumed, and where value was added to those states' economies.

Finally, the third prong of the *Complete Auto* test is satisfied because the single business tax does not discriminate against interstate commerce. Instead, it levels the playing field so all companies can compete fairly without an undo economic advantage. A Michigan company that performs services for a Michigan construction project receives no advantage over an out-of-state firm performing the same services for a Michigan construction project. Fluor "must prove by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate

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[20] See *Trinova, supra,* 498 US 377-378.

proportion to the business transacted . . . in that State."[22] Fluor has failed to demonstrate that the Court of Appeals interpretation of § 53(c) violates the Commerce Clause.

[21] Court of Appeals slip Opinion, page 9, Cross-Appellant's Appendix pp 37a-38a, citing *Allied-Signal, Inc v Director, Div of Taxation,* 504 US 768; 112 S Ct 2251; 119 L Ed 2d 533 (1992) and *Trinova Corp v Dep't of Treasury,* 498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991).
[22] *Trinova,* at 380, quotes omitted.

CONCLUSION

The plain language and legislative history of MCL 208.53(c) demonstrate that the Legislature intended that services consumed in Michigan for Michigan construction projects are treated as Michigan receipts for purposes of computing single business tax liability. The Department administers the statute consistent with this clear legislative intent. The Court of Appeals correctly interpreted § 53(c) and its interpretation does not result in a violation of the Commerce Clause.

RELIEF SOUGHT

WHEREFORE, Defendant Michigan Department of Treasury prays that this Court affirm that portion of the decision of the Court of Appeals holding that § 53(c) of the Single Business Tax Act requires that services performed out-of-state for construction projects in Michigan are appropriately included in a taxpayer's Michigan sales for purposes of determining single business tax liability.

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